

State of Colorado



Bill Owens
Governor

Stacy L. Worthington
Board Director

DPA

**Department of Personnel
& Administration**

State Personnel Board
The Chancery
1120 Lincoln St., Suite 1420
Denver, Colorado 80203
Phone (303) 764-1472
Fax (303) 894-2147

Meeting Minutes October 21, 2003

The State Personnel Board met in public session on Tuesday, October 21, 2003, at the Colorado Department of Transportation, 4201 East Arkansas Avenue, Second Floor Auditorium, Denver, Colorado 80222.

The meeting was called to order by Chair Joyce Lottner at approximately 9:05 a.m. In addition to Ms. Lottner, Board members Diedra Garcia, Elizabeth Salkind, and John Zakhem were present. Board member Linda Siderius was absent.

Stacy L. Worthington, Board Director; First Assistant Attorney General Richard Forman, Board Counsel; and Jane Sprague, Legal Assistant, were present.

RULEMAKING

Pursuant to the Notice of Proposed Rulemaking issued on August 15, 2003, and published in the Colorado Register on September 10, 2003, the Board considered amendments to State Personnel Board Rule R-1-17(B) to correct an error in wording in the official publication of the rules, and the repeal of Board Rules R-7-21, R-7-22, R-7-23, and R-7-24 (Separation Incentives) to comply with statute.

Following the Board's discussion of R-1-17(B) and its desire to modify the language of this rule to read, "the HRIP complies with THE COLORADO CONSTITUTION, statutes, Board rules and director's procedures," Mr. Zakhem made a motion to adopt the proposed language for R-1-17(B), with the modifications set forth during deliberation, and to repeal R-7-21, R-7-22, R-7-23, and R-7-24, attached as ATTACHMENT A to these minutes, as permanent amendments to the rules, finding that:

- The record of the rule-making proceeding demonstrates the need for the rules and such rules.
- The proper statutory authority exists for the rules.

- To the extent practicable, the rules are clearly and simply stated so that their meaning will be understood by any party required to comply with the rules.
- The rules do not conflict with other provisions of the law.
- The duplication or overlapping of the rules, if any, has been explained by the Board.

Mr. Zakhem also moved to adopt the proposed Statement of Basis and Purpose, attached as ATTACHMENT B to these minutes. Ms. Garcia seconded this two-part motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

I. REQUESTS FOR RESIDENCY WAIVERS

A. October 1, 2003 Report on Residency Waivers

Director Worthington reported that there had been three requests for residency waivers during the past month from the Department of Human Services, which she granted for the positions of Rehabilitation Counselor, Psychologist, and Nurse Anesthetist.

II. PENDING MATTERS

There were no pending matters before the Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. Kevin Harvey v. Department of Human Services, Division of Youth Corrections, Mount View Youth Service Center, State Personnel Board case number 2002G129.

Director Worthington recused herself from participation in the discussion of this case. Legal Assistant Sprague called the case number and the vote in lieu of the Director.

After discussing the provisions of the Whistleblower Act, Mr. Zakhem moved to adopt the Dismissal Order, the findings of fact and conclusions of law in the Initial Decision and Order Denying Respondent's Request for Attorney Fees, and the Initial Decision of the Administrative Law Judge. Ms. Lottner seconded the motion.

This order represents the affirmative vote of the following Board members: Ms. Garcia, Mr. Zakhem, and Ms. Lottner. Ms. Salkind voted in opposition to the motion. Ms. Siderius was absent.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Leona M. Olquin v. Department of Transportation, Materials and Geotechnical Branch, State Personnel Board case number 2003G100.

Ms. Garcia moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

- B. Kevin Harvey v. Department of Human Services, Division of Youth Corrections, Mount View Youth Service Center, State Personnel Board case number 2003G111.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Ms. Lottner seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

- C. Gayle Marie Ross v. Department of Corrections, Denver Women's Correctional Facility, State Personnel Board case number 2003G122.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

Director Worthington recused herself from participation in the discussion of the next two cases. Legal Assistant Sprague called the case numbers and the votes in lieu of the Director.

- D. Ennio Daniel v. Department of Public Health and Environment, State Personnel Board case number 2002G065.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Director and deny the petition for hearing. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

- E. Carol Roberson v. Regents of the University of Colorado, University of Colorado Health Sciences Center, State Personnel Board case number 2002G064.

Ms. Garcia moved to adopt the Preliminary Recommendation of the Director and deny the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Rhonda L. Eleneki v. Trustees of the State Colleges in Colorado, Metropolitan State College, State Personnel Board case number 2002B150.

On September 11, 2003, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's administrative discharge of Complainant was not arbitrary, capricious or contrary to rule or law, and ordered that Respondent's action is affirmed and Complainant's appeal is dismissed with prejudice.

- B. Jack Miller v. Department of Corrections, Fremont Correctional Facility, State Personnel Board case number 2002B077.

On September 19, 2003, the Order Granting Summary Judgment in Favor of Respondent and Dismissing Complainant's Appeal With Prejudice was issued. The ALJ found that Respondent's separation of Complainant from his employment for exhaustion of leave was not arbitrary, capricious or contrary to rule or law. The ALJ ordered that DOC is entitled to judgment as a matter of law and Complainant's appeal is dismissed with prejudice.

- C. Tina Sterling v. Regents of the University of Colorado, University of Colorado at Denver, State Personnel Board case number 2003B085.

On September 29, 2003, the Order Regarding Respondent's Motion for Summary Judgment was issued. The ALJ found that Respondent had authority to rescind the layoff; Complainant failed to report to work so Respondent concluded that Complainant had resigned; and given Complainant's refusal to acknowledge the rescission of the layoff and her refusal to report to work on April 18, 2003, coupled with her counsel's request that Respondent "provide all legally required benefits, including COBRA information and pay for annual and sick leave for which [Complainant] is entitled," Respondent's conclusion was reasonable. The

ALJ granted Respondent's motion for summary judgment and dismissed the matter with prejudice.

- D. Larry K. Lara v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2002B054.

On October 3, 2003, the Order Granting Summary Judgment; Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's disciplinary termination of Complainant was not arbitrary, capricious or contrary to rule or law. The ALJ ordered that DOC is entitled to judgment as a matter of law, Respondent's action is affirmed, and Complainant's appeal is dismissed with prejudice.

VI. REVIEW OF THE MINUTES FROM THE SEPTEMBER 16, 2003 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

On page 5 of the minutes, Ms. Lottner brought to the Board's attention the fact that the words "what the" were in reverse order under the discussion on Changes to the Whistleblower Statute - Draft Statute in the sentence which was intended to read, "calling upon Pat Romero from DPA to describe what the investigators look for." Mr. Zakhem moved to amend the minutes to read "what the" and approve them as amended. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS SEPTEMBER 16, 2003 PUBLIC MEETING:

- A. Anwar Hussein v. Regents of the University of Colorado, University of Colorado at Colorado Springs, State Personnel Board case number 2002B041.

The Board voted to deny Complainant's Exceptions to the Preliminary Recommendation of the Administrative Law Judge.

- B. Joseph Encinias v. Department of Transportation, State Personnel Board case number 2003B078.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

- C. Joyce Miller v. Department of Personnel, Division of Finance and Procurement, Office of State Controller, State Personnel Board case number 2003G010.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- D. Erica Glass v. Department of Human Services, Food Distribution Unit, State Personnel Board case number 2003G105.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- E. Catherine Thurston v. Department of Revenue, Taxpayer Service, State Personnel Board case number 2003G097.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- F. Chris Lange v. Trustees of the State Colleges in Colorado, Mesa State College, State Personnel Board case number 2003G059.

The Board voted to adopt the Preliminary Recommendation of the Director and deny the petition for hearing.

- G. Daniel W. Manning v. Department of Higher Education, Auraria Higher Education Center, Division of Facilities Management, State Personnel Board case number 2002B117.

The Board voted to adopt the Preliminary Recommendation of the Director and deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - TROY A. EID

Mr. Eid addressed the Board for the last time prior to his departure, thanking the Board members and staff for the experience of working with them, particularly in the context of the Civil Service Reform Commission. He thanked Jane Sprague for her expertise and enthusiastic assistance and Stacy Worthington for providing excellent general management and leadership to the Board.

With regard to the Civil Service Reform Commission, he discussed the release of the final report of the Commission on October 8, 2003, and the relationship of the Personnel Director and the Board. He stated that the report emphasizes the role of the Board, which must remain focused on being a neutral arbiter of disciplinary and termination cases, and the clear demarcation between the Personnel Director and the Board. The report recommends that the Personnel Director be taken out of the constitution, but not the State Personnel Board. Mr. Eid thanked Diedra Garcia for her work on the Commission, and stated that sponsors for the

legislation, which will be introduced in January 2004, include Rosemary Marshall, Norma Anderson, and Lola Spradley. There is also a support group for the legislation, and Mr. Eid will work from the "outside," including working with Mayor Hickenlooper and others. If a referendum is not forthcoming, the recommendations of the Commission will take the form of an initiative, which would be expensive to promote.

As to higher education, Attorney General Ken Salazar has issued a formal opinion that allows higher education personnel to "opt out" or stay in the personnel system. Higher education changes may be made via a bill or a "coalition of the willing." The important aspect of higher education is to preserve and protect rights, such as PERA rights and classified employees could be grandfathered into state civil service, but incumbent employees must not be adversely affected as to pay, status or tenure.

With respect to outsourcing or contracting out, this term applies to those duties that employees have not traditionally or historically performed, for example, the statewide telecommunications network. Currently, about \$7 billion is contracted out compared to the total state budget of \$13 billion. By contrast are the 85 FTEs in state government who do printing operations. Although an audit recommended that printing operations be contracted out, the constitution does not provide for contracting out or getting rid of those jobs which have been traditionally or historically performed and the state cannot outsource those jobs if there were to be an adverse effect on pay, status or tenure of employees.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Budget Report and Revenue and Expense Report
- Cases Scheduled for Preliminary Review
- Cases on Appeal to the Board and to Appellate Courts
- Changes to the Whistleblower Statute
- Order Affirmed/Mandate; Brown v. Department of Higher Education, Regents of the University of Colorado, University of Colorado System, Procurement Service Center, State Personnel Board case number 2001B129, Court of Appeals No. 02CA1306
- Mandate in Mangione v. Department of Public Health and Environment, Disease Control Division, State Personnel Board case number 2002G124, Court of Appeals No. 03CA38
- Order Affirmed/Mandate in Tucker v. Department of Public Health and Environment, State Personnel Board case number 2002B001, Court of Appeals No. 02CA1721

Director Worthington reported on three topics. Regarding changes to the Whistleblower Statute, she met with Pat Romero of DPA regarding the

nature of investigations and time constraints for whistleblower claims. Although the Commission recommended that the investigation by DPA be eliminated, the Board expressed a desire to retain that investigation by DPA, but perhaps allowing extension of the deadlines for good cause. Support for such issues could be obtained from legislators and/or incorporated into the Civil Service reform which has been proposed. Ms. Worthington is to draft a letter from the Board to Mr. Eid to request his support for the Board's proposed amendments to the statute. Ms. Worthington will also speak to the Legislative Liaison Jeff Woodhouse about how to present changes to the statute.

On the issue of charging parties for the preparation of the record on appeal, Ms. Worthington reported that courts and administrative agencies generally don't charge a flat fee for record preparation, but some charge a per page fee. After she asked the Board for its opinion, several members proposed that the Board retain its policy of charging a \$50 flat fee for record preparation, but allow for parties to request a waiver of the fee if they are unable to meet this expense. A procedure for a waiver of the fee will be added to the pro se handout that the Board currently disburses.

Ms. Worthington mentioned that interim performance evaluations were due, that she had sent out a survey on staff performance, and that she was seeking Board input on performance. The Board staff internal telephone message policy was discussed, including the necessity of promptly returning all calls.

B. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

The Board did not go into Executive Session and adjourned by consensus.

X. EXECUTIVE SESSION

A. Case Status Report

* * * * *

Having no more business, the meeting adjourned by consensus.

APPROVED THIS 18th DAY OF NOVEMBER, 2003.

Joyce Lottner, Chair

John Zakhem, Vice Chair

Diedra Garcia, Member

Elizabeth Salkind, Member